PP

v.

SHARITHAN PACHEMUTHU

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM J
[CRIMINAL TRIAL NO: 45-27-99]
13 OCTOBER 1999

CRIMINAL PROCEDURE: *Sentence - Youthful offender - Charge under s. 39A(2) Dangerous Drugs Act 1952 - Sentence of 6 years' imprisonment and 10 strokes of cane - Offender not a 1st offender and currently serving sentence in Henry Gurney School - Whether offender should continue serving detention in school - Whether offender could be suitably dealt with any other way than with punishment under Act - Criminal Procedure Code, s. 294 - Plea of guilty and cooperation with police - Whether taken into account in assessing sentence*

The offender was a young person aged 17 years and 10 months who pleaded guilty to a charge under s. 39A(2) of the Dangerous Drugs Act 1952 ('the Act'). The probation report disclosed that the offender had committed three armed robberies. The present offence was committed during the period of bond in respect of the 1st offence. The offender was serving sentence in the Henry Gurney School in respect of the other two robberies.

It was pleaded for the offender that he should be allowed to continue serving detention in Henry Gurney School.

Held:

[1] Having regard to the offender's background and character as disclosed in the probation report which the offender admitted to be true, and the nature of the offence charged, the offender could not be suitably dealt with any other way except with the punishment as provided for under the Act. This was despite the fact that he had pleaded guilty and had cooperated with the police. The options available were not suitable as this was a serious offence.

[2] The probation report was not in his favour. The offender had also committed three other offences, two of which were committed during the period of bond in respect of the first offence. The offender neither seemed to have repented nor learned a lesson to lead an honest living.

[3] Persons indulging in this type of offence are a scourge to society and unless the courts treat deterrence and public interest as vital factors in sentencing, the whole purpose of enacting s. 39A(2) which imposes a life

sentence or imprisonment not less than five years and whipping of not less than ten strokes would be meaningless. The offender must be punished accordingly.

[4] It is an accepted practice that an accused person on a plea of guilty be given credit or discount of between 1/3 and 1/4 off the sentence that would have been imposed had the accused been tried and found guilty. In this case, ten years' imprisonment would have been a reasonable punishment had the offender been tried and found guilty. However, since he had pleaded guilty and was a young person who had cooperated with the police, a 1/3 discount should be given, *ie*, six years' imprisonment and 10 strokes of the cane.

[Order accordingly.]

Case(s) referred to:
PP v. Nazaruddin Ahmad & Ors [1993] 2 MLJ 9 ***(dist)***
PP v. Saiful Afikin Mohd Firus [1996] 4 MLJ 309 ***(dist)***
PP v. The Offender [1998] 4 MLJ 152 ***(dist)***
PP v. Wahid Yaakob [1996] 5 MLJ 31 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 294
Dangerous Drugs Act 1952, ss. 12(2), 39A(2), 39B(1)(a)
Penal Code, ss. 304, 392, 397
Juvenile Courts Act 1947, ss. 12(1)(d), 15, 21, 40

For the PP - Lukman Zainuddin
For the Offender - M Sathia; M/s Sathia & Assocs

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim J:

The offender, who was 17 years and 10 months when he committed the offence, was originally charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) of trafficking 18 grammes of mixture of heroin (13.5 grammes) and monoacetylmorphines (4.5 grammes). However, on the day of the trial, the prosecution, upon representation by the offender, reduced the charge to one of possession thereof, an offence punishable under s. 39A(2) of the Act.

The facts of the case presented by the prosecution showed that the offender was stopped and searched by a police party led by Police Inspector Mohd Azam in a restaurant at Jalan Hang Kasturi, Kuala Lumpur. During the search,

the offender was found to have in his right hand a tracksuit from which the police recovered a plastic bag. Inside the bag, there were two packages containing 150 small packets of pinkish granular and powdery substance suspected to be heroin. The offender was arrested and was subsequently brought to Jabatan Narkotik IPK, Kuala Lumpur together with the contents of the bag. A police report was lodged. The chemist report confirmed that the 150 packets contained pinkish granular and powdery substance which contained 13.5 grammes of heroin, and 4.5 grammes of monoacetylmorphines and they are dangerous drugs as listed under the first schedule to the Act.

On being satisfied that the offender understood the charge, the nature and consequences of his plea of guilty without qualification, I found him guilty, and after hearing his learned counsel in mitigation for the offender to be detained in Henry Gurney School and the learned assistant public prosecutor in reply for a deterrent sentence, and having perused the probation report on the offender, I on 30 September 1999, convicted the offender and sentenced him to six years' imprisonment effective from the date of arrest *ie*, 23 July 1998 and ordered to be given the mandatory 10 strokes of the cane.

I now give my reasons for so doing.

At the time of writing this judgment, I discovered that the offence of possession as per amended charge (P3) was wrongly stated to be under s. 39A(2) instead of s. 12(2) of the Act. However, I was satisfied that the offender had truly pleaded guilty to the charge of possession which is an offence punishable under s. 39A(2) of the Act and he understood the charge, the nature and consequences of his guilty plea and admitted the facts of the case to be true, without any reservation whatsoever. Therefore, the offender was not misled by the irregularity and as such, no failure of justice was caused in this case.

It is to be noted that the offence under consideration is the fourth offence that the offender had committed. The other three offences are:

(i) On 26 June 1997 – Armed robbery under ss. 392 and 397 of the Penal Code, *vide* Juvenile Court Rawang Kes: 84-27-97. On 6 November 1997 the offender was ordered to be released on bond for three years to be under the care of his parents and probation officer in the sum of RM5,000 under ss. 12(1)(d) and 21 of the Juvenile Courts Act 1947 (the JCA).

(ii) On 27 October 1997 – Armed robbery under ss. 392 and 397 of the Penal Code *vide* Magistrate's Court Rawang *vide* kes No. 83-717-97. On 23 December 1998 the offender was ordered to be detained in Henry Gurney School until he reaches the age of 21 years.

(iii) On 5 November 1997 – Armed robbery under ss. 392 and 397 of the Penal Code *vide* Magistrate's Court *vide* kes: 83-716-97. On 28 January 1999 the offender was ordered to be detained in Henry Gurney School until he reaches the age of 21 years.

From the above record it is clear that the present offence was committed during the period of bond in respect of the first offence.

Learned counsel for the offender pleaded to the court that the offender should be given another chance for him to continue serving the detention in the Henry Gurney School concurrently with the orders in respect of the earlier two offences until he reaches the age of 21 years, and cited among others, two cases:

(i) *PP v. Saiful Afikin Mohd Firus* [1996] 4 MLJ 309, and

(ii) *PP v. The Offender* [1998] 4 MLJ 152,

in support.

The offence under which the offender was charged is a very serious offence under the law. The punishment under s. 39A(2) is imprisonment for life or for a term which shall not be less than five years and whipping of not less than 10 strokes.

For the purpose of this charge, the relevant age to be considered by the court is the age when the offender committed the offence and not the age at the time of the sentence. At the material time, the offender was a young person, being above 14 and under 18 years of the age, and at the date of the sentence before me he was 19 years 18 days' old.

There are, however, restrictions on punishment of young persons under s. 15 of the JCA, which this High Court must have regard to before considering a suitable punishment on a young person (see s. 40 of the JCA). Section 15 of the JCA provides:

(1) ...

(2) No young person shall be sentenced or ordered to be imprisoned **if he can be suitably dealt with any other way** whether by probation, fine, or committed to a place of detention, approved school, or Henry Gurney School, or otherwise

(3) ...

(Emphasis added.)

Having regard to his background and character as disclosed in the probation report (P18) which the offender admitted to be true, and the nature of the offence charged, I found the offender could not be suitably dealt with any other way except with the punishment as provided for under the Act, even though he had pleaded guilty and had cooperated with the police. The option of probation, fine, or committed to a place of detention, approved school or Henry Gurney or even binding over under s. 294 of the Criminal Procedure Code (FMS Cap 6) is not suitable as this is a very serious offence.

The probation report was not in his favour. Besides this offence, the offender had committed three armed robberies, two of which were committed during the period of bond in respect of the first offence. Therefore, he had disregarded the bond that his parents had executed for his proper care and he had also ignored the probation order. He failed to make good use of the opportunity during the bond to turn over a new leaf. Instead, he resorted to more crimes. Thus, by committing this offence, the offender did not seem to have repented and learned a lesson to lead an honest living. He was not too young and immature as not to know what he was doing. He had even told his mother that he wanted to be rich so that his family and relatives would love him (see p. 18, Hal-Hal Lain, para: 1). Since he was so brave to commit this offence, he must also be brave to suffer the penalties prescribed by law.

The seriousness of the offence needs no further emphasis. However, if an illustration of its seriousness is still needed, then, I can do no better than to refer to a recent pronouncement by the government on the matter. On 12 July 1999 the Deputy Prime Minister and Minister of Home Affairs was quoted in Star at front page under the headline "Joint War – Pak Lah calls for all-party offensive against drug menace" and said:

> ... The drug problem did not distinguish between political ideology, race or religion or between rich and poor. Describing the drug menace as the biggest threat to the country, he said, it was vital for all parties to joint hands and minds to fight it effectively for the good of society ...
>
> We have been waging war against drugs for such a long time and we are still at it. We managed to overcome even the communist insurgency problem within a shorter period of time ...
>
> ... The drug problem is a danger facing us all ...
>
> He pointed out if the drug problem was treated lightly, it could spread and escalate to 'emergency levels' ...

Persons indulging in this type of offence are a scourge to society and unless the courts treat deterrence and the public interest as vital factors in sentencing,

the whole purpose of enacting s. 39A(2) which imposes a life sentence or imprisonment not less than five years and whipping of not less than ten strokes would be meaningless. Thus, in this type of offence, the public interest should never be relegated to the background and must of necessity assume the foremost importance. Hence, the offender must be punished accordingly.

This case is readily distinguishable from the two cases cited by the learned counsel and thus, they are not applicable to the instant case.

Saiful Afikin, (supra) charged under the first limb of s. 304 of the Penal Code, (the Code) was a first offender and being 16 years old, was younger by one year ten months than the offender in this case. The court there suitably committed Saiful to Henry Gurney School until he attained the age of 21 years. However, in *PP v. Nazarudin bin Ahmad & Ors* [1993] 2 MLJ 9, the 3rd accused, a young person under 18 years old and a first offender, was sentenced to five years' imprisonment for the offence of culpable homicide not amounting to murder under the first limb of s. 304 of the same Code.

In *The Offender (supra)*, the offender there was even younger, only 14 years 1 month old when he committed a similar offence as the offender in this case. But the probation report of the offender was not adverse to him, unlike the one in this case. Moreover, the weight of the drugs there was only 1.8 grammes heroin and 4.8 grammes monoacetylmorphines, a total of 6.6 grammes; whereas in the instant case, the total weight of the drugs was 18 grammes. Therefore, the High Court there rightly ordered the offender to an approved school.

However, it has been an accepted practice that the accused person on a plea of guilty, be given credit or discount of between 1/4 and 1/3 off the sentence that would have been imposed had the accused been tried and found guilty (*PP lwn. Wahid Yaakob* [1996] 5 MLJ 31).

Thus, taking everything into account, I considered ten years' imprisonment would be reasonable punishment for the offence had the offender been tried and found guilty. But, since he had pleaded guilty and being a young person and had cooperated with the police, I gave him 1/3 discount and convicted and sentenced him to six years' imprisonment and ten strokes of the cane. Indeed, it is hoped that the sentence imposed would make the offender realise the consequence of his foolish acts and at the same time, it would raise the public's awareness of the seriousness of the offence under the Act.